



**DEPARTMENT OF ENVIRONMENTAL QUALITY
POLICY AND PROCEDURES**

**SUBJECT: Processing Voluntary Disclosures of Number: 04-001
Violations made pursuant to Section
14809 of Part 148 of Act 451 of 1994.**

Date: January 23, 1997

Page 1 of 11

ISSUE

Environmental Audit legislation was passed by the Legislature and signed on March 18, 1996. This legislation amended the Natural Resources and Environmental Protection Act (NREPA). Section 14809 of Part 148 of NREPA provides limited immunity from administrative and civil penalties, as well as immunity from criminal fines and penalties for negligent acts or omissions, for persons who make voluntary disclosure of violations of Article II and Chapters 1 and 3 of Article III of NREPA. The immunity provided for does not apply to any criminal penalties or fines for gross negligence, nor does it eliminate or affect a person's legal responsibility to correct the violation, conduct necessary remediation, or pay damages.

The environmental audit legislation places certain responsibilities on the Department and provides opportunities for information to be submitted to the Department. Departmental procedures are needed to facilitate the Department in carrying out its responsibilities under the legislation and processing submittals in an efficient and uniform manner.

DEFINITIONS

"Annual Report": a report made pursuant to Section 14810 of Part 148. This regulation requires the Department to maintain a database of general information relative to voluntary disclosures made and to publish an annual report of information in this database. This database shall include the number of voluntary disclosures made agency wide, and summarize in general categories the types of violations and the times needed to achieve compliance.

“Confidentiality Agreement”: An agreement executed between the Department and an entity making a voluntary disclosure pursuant to Part 148 that provides that certain information contained in an environmental audit is privileged and confidential. Section 14803 provides that disclosure of the privileged information in an environmental audit report does not waive the privilege if the disclosure is made under the terms of a Confidentiality Agreement between governmental officials and the person for whom the environmental audit report was prepared. A confidentiality agreement can be executed by the person making the disclosure signing and dating the self-initiating “Nonwaiver of Privilege Confidentiality Agreement” form provided by the Department. An Agreement can also be individually developed for a specific submittal, in which case it must be signed and dated by the person making the disclosure and an authorized representative of the Department.

“Environmental Audit”: An environmental audit is a voluntary, internal evaluation of a facility (or activity) regulated by environmental requirements in NREPA, conducted after March 18, 1996, that is designed to:

- Identify past or current noncompliance;

- Prevent noncompliance or improve compliance;

- Identify an existing or potential hazard, contamination, or adverse environmental condition; or

- Improve an environmental management system or process.

POLICY

The Department strongly supports voluntary disclosure of violations by regulated entities as a means of maintaining and improving environmental quality. Voluntary disclosures under Section 14809 of NREPA are to be handled in accordance with this procedure and under normal division procedures and practices utilized in dealing with other voluntary disclosures of violations. The district office shall be the initial point of contact and take the lead in processing these voluntary disclosures. There is a rebuttable presumption that a disclosure is voluntary pursuant to Part 148. The Department may rebut that presumption. Therefore, upon receipt of a voluntary disclosure, staff are

not to indicate or state that a voluntary disclosure satisfies the criteria for disclosure and immunity under Section 14809.

PROCEDURE: Responding to Verbal and Written Inquiries Regarding Voluntary Disclosures of Violations

<u>Responsibility</u>	<u>Action</u>
All Department Employees	<ol style="list-style-type: none"> 1. Receive inquiry regarding voluntary disclosure of violations pursuant to NREPA. 2. Advise inquirer that a person making a voluntary disclosure must provide information supporting his or her claim that the disclosure is voluntary, and the voluntary disclosure of that information waives any privilege that information may have had under Part 148. 3. Refer inquiry to appropriate district supervisor or Environmental Assistance Center. <p>*NOTE: As stated in the Policy, Department employees should not indicate or state that a disclosure proposed by an inquirer satisfies the criteria set out in Part 148 of NREPA.</p>
Environmental Assistance Center, Environmental Assistance Division and District Office Staff	<ol style="list-style-type: none"> 4. Respond to questions concerning Part 148 of NREPA or direct inquirer to Department employee who has the necessary information.

PROCEDURE:

<u>Responsibility</u>	<u>Action</u>
Environmental Assistance Center, Environmental Assistance Division and District Office Staff	<p>5. Inform inquirer that all voluntary disclosures made pursuant to Part 148 of NREPA should be made in writing; recommend use of Voluntary Violation Disclosure Submittal Form (Attachment A) in making such a disclosure.</p> <p>6. Give or mail form to inquirer, as requested.</p>

PROCEDURE: Establishing Lead Division Responsibility; Coordinating Intake and Tracking of Written Voluntary Disclosures of Violations; Conducting Training

<u>Responsibility</u>	<u>Action</u>
District Supervisors	<p>1. Within 60 days of the date of this procedure, develop district-specific procedures for:</p> <p>A. answering incoming calls and requests for information regarding voluntary disclosure of violations;</p> <p>B. determining lead division on written violation disclosures;</p> <p>C. sharing disclosure information between affected divisions;</p> <p>D. tracking status of disposition of written disclosures;</p> <p>E. handling, tracking and filing confidentiality agreements;</p> <p>F. handling and tracking Freedom of Information Act (FOIA) requests for voluntary disclosures of violations.</p>

PROCEDURE:

<u>Responsibility</u>	<u>Action</u>
District Supervisor	<p>2. Train district office staff regarding the procedures developed in Step 1 above and in procedures listed under "Processing Written Voluntary Disclosure of Violations" and "Processing FOIA Requests for Voluntary Disclosures of Violations" elsewhere in this procedure.</p> <p>3. Establish lead division responsibility and coordinate intake and tracking of written voluntary disclosures of violation in accordance with district-specific procedures.</p>

PROCEDURE: Processing Written Voluntary Disclosures of Violations and Related Confidentiality Agreements

<u>Responsibility</u>	<u>Action</u>
Lead Division District Staff	<p>1. Receive Voluntary Violation Disclosure Submittal Forms, other written voluntary disclosures, related confidentiality agreements and supporting information.</p> <p>2. Review submittal to determine if confidentiality of submitted materials has been requested. If no, proceed to step 3. If yes, proceed to Step 2A.</p> <p>A. Determine if submittal is accompanied by an executed confidentiality agreement. If no, return entire disclosure to submitter with explanation of the proper procedures to retain privilege of disclosed information. Do not treat the submittal as a Voluntary Disclosure. (This process will be evaluated in one year to determine if it should be continued). If yes, proceed to Step 2B.</p>

PROCEDURE:

<u>Responsibility</u>	<u>Action</u>
Lead Division District Staff	<p>B. Review the confidentiality agreement to make sure it is properly executed:</p> <ul style="list-style-type: none"> • Is it on the approved Department form or an individually developed agreement agreed to and signed by an authorized representative of the Department? • Was the agreement received before the expiration date on the form? <p>Is the agreement signed and dated?</p> <p>If no, return entire disclosure to submitter with explanation of the proper procedures to retain privilege of disclosed information. Do not treat the submittal as a Voluntary Disclosure. (This process will be evaluated in one year to determine if it should be continued). If yes, proceed to Step 2C.</p> <p>C Treat materials as confidential until a formal determination is made by the department that the materials are not subject to a privilege.</p> <ul style="list-style-type: none"> • Stamp all materials for which a privilege is claimed as "Confidential-Privilege Asserted Document." • Maintain materials so marked in secured file. <p>Proceed to step 3</p> <p>3. Review Voluntary Violation Disclosure Form/written disclosure to verify that the violation disclosed is regulated by Article II or Chapters 1 and 3 of Article III of NREPA and in district program area.</p>

DEQ POLICY AND PROCEDURES

SUBJECT: PROCESSING VOLUNTARY DISCLOSURES

NUMBER: 04-001

DATE: January 23, 1997

PAGE: 7 OF 11

PROCEDURE:

<u>Responsibility</u>	<u>Action</u>
Lead Division District Staff	<p>A. If violation is regulated under Article II or Chapters 1 and 3 of Article III of NREPA and is in a district office program area, proceed to Step 4.</p> <p>B. If violation is regulated by NREPA but not in district office program area, forward written disclosure to appropriate Department section chief for processing.</p> <p>C. If violation is NOT regulated under Article II or Chapters 1 and 3 of Article III of NREPA, return the disclosed materials that are not covered under NREPA notifying the person making the disclosure that the violation is not covered by Part 148 and, if known, the name, phone number, and address of the agency that administers the violation that was disclosed.</p> <p>4. Review to determine if violation extends into other Department program areas.</p> <p>A. If yes, follow procedure for inter-divisional coordination established in Step 1 of procedure for "Establishing Lead Division Responsibility" in this document. Then proceed to Step 5.</p> <p>B. If not, proceed to Step 5.</p> <p>5. Determine if the violation is of such magnitude, duration or impact that it should be considered for further investigation or enforcement follow-up. Further enforcement follow-up would include such things as rebutting the presumption that the disclosure is voluntary, seeking damages, challenging the privilege asserted in a confidentiality agreement, or establishing a corrective program.</p>

PROCEDURE:

<u>Responsibility</u>	<u>Action</u>
Lead Division District Staff	<p>A. If no further investigation or enforcement follow-up is warranted, then complete Agency Use Information section of Voluntary Violation Disclosure Submittal Form; forward copy of completed form to Technical Assistance Section (TAS), EAD. Maintain original Violation Disclosure Submittal Form and supporting information in appropriate District file.</p> <p>B. If it is determined that further investigation or enforcement follow-up may be warranted, discuss the violations with District Supervisor to determine next steps.</p> <p>C. Following discussion with the District Supervisor, if it is decided to rebut the presumption, then hold the Violation Disclosure Submittal Form until resolution of the rebuttable presumption issue. Following resolution, forward a copy of the Voluntary Disclosure Submittal Form to the TAS/EAD.</p> <p>D. If any action is taken other than a decision to rebut the presumption, such as seeking natural resources damages, establishing an appropriate corrective program, requiring necessary remediation or challenging the privilege asserted in a confidentiality agreement, then submit a copy of the Violation Disclosure Submittal Form (if complete) to the TAS/EAD. If the Violation Disclosure Submittal Form is incomplete, complete the form and forward a copy to EAD.</p>

PROCEDURE:

<u>Responsibility</u>	<u>Action</u>
Lead Division District Staff	(NOTE: If the disclosure processed under Step 5A, 5C, or 5D does not include the Voluntary Disclosure Submittal Form or the form is incomplete, then the Lead District Staff has the responsibility to complete the form before forwarding a copy to EAD.)
Section Chiefs	6. Receive Voluntary Violation Disclosure Submittal Form or other written voluntary disclosure, forwarded under Step 3A of this procedure; process according to Steps 3-5 of this procedure, or delegate to appropriate staff members to process.

PROCEDURE: Processing Freedom of Information (FOIA) Requests for Voluntary Disclosures of Violations

<u>Responsibility</u>	<u>Action</u>
Lead Division District Staff	<p>1. Receive, process and track FOIA requests for Voluntary Disclosures of Violations.</p> <p>2. Review Voluntary Violation Disclosure requested under FOIA to determine if there is a related confidentiality agreement. If no confidentiality agreement, process the FOIA request pursuant to the normal division FOIA procedures.</p> <p>3. If there is a related confidentiality agreement, discuss matter with field supervisory staff, compliance and enforcement staff, or Department FOIA Officer, as appropriate.</p>

PROCEDURE:

<u>Responsibility</u>	<u>Action</u>
Lead Division District Staff	<p>4. Evaluate Voluntary Violation Disclosure to determine which components are claimed to be privileged by the submitter. Process those components staff agree are privileged pursuant to division FOIA procedures.</p> <p>5. For those components of the Voluntary Violation Disclosure staff determine are not privileged, notify the Voluntary Violation Disclosure/confidentiality agreement submitter of staff's intention to process those components pursuant to the division FOIA procedures and, if appropriate, release these materials to the FOIA requester.</p>

PROCEDURE: Compiling and Reporting Voluntary Disclosure of Information

<u>Responsibility</u>	<u>Action</u>
EAD (Technical Assistance Section)	<p>1. Receive copies of Voluntary Violation Disclosure Submittal Form or other written voluntary disclosure of violation from district staff or section chief in Step 5 of "Processing Written Voluntary Disclosure of Violations" procedure.</p> <p>2. Compile and maintain information received in Voluntary Disclosure Database.</p> <p>3. Prepare summaries of information in the Voluntary Disclosure Database for Department management review, as requested.</p> <p>4. Prepare annual report of information contained in the Voluntary Disclosure Database, by March 15 of each year, for the previous calendar year as required in Section 14810(1) of NREPA.</p>

PROCEDURE:

<u>Responsibility</u>	<u>Action</u>
EAD (Technical Assistance Section)	5. Coordinate preparation of report required by Section 14010(2). The first report under this section is due March 15, 2001.

Approved:  Date: 2/3/97